

(27,276)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 521.

O. O. ASKREN, ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, ET AL., APPELLANTS,

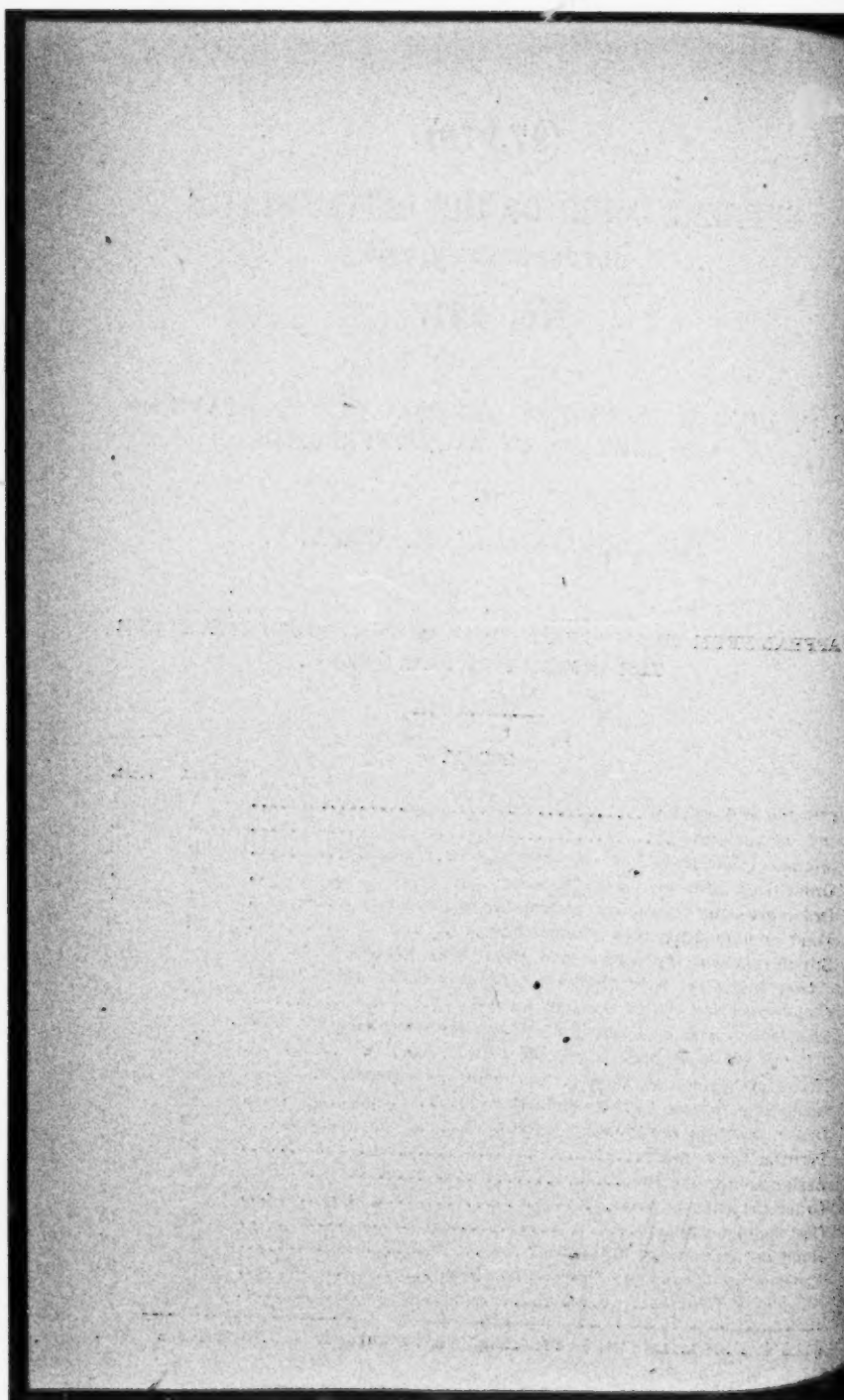
vs.

THE CONTINENTAL OIL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW MEXICO.

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Citation.

United States of America to The Continental Oil Company, Greeting:

You are hereby cited and admonished and to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days after this citation bears date, pursuant to an appeal allowed and filed in the office of the Clerk of the United States District Court for the District of New Mexico, wherein O. O. Askren, Attorney General of the State of New Mexico, Charles U. Strong, Treasurer of the said State, Manuel Martinez, Secretary of State of the said State, and Alexander Read, District Attorney of the First District Attorney's District of the said State are appellants and you are appellee, to show cause, if any there be, why the decretal order rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals of the Eighth Circuit this 17th day of July, 1919.

WALTER H. SANBORN,
*Presiding Judge, etc., and One of the Judges
Constituting a Special Tribunal in said
Cause under Section 266 of the Judicial
Code.*

SANTA FE, N. M., July 22, 1919.

Due service of the above and foregoing citation on appeal is hereby admitted this 22nd day of July, 1919.

E. R. WRIGHT,
Attorney for Plaintiff (Appellee).

2 In the District Court of the United States for the District of New Mexico.

Be it remembered, that heretofore, to-wit: on the 26th day of June, A. D. 1919, there was filed in the United States District Court for the District of New Mexico, in the office of the Clerk thereof, a Bill of Complaint, which said Bill of Complaint is in the words and figures as follows, to-wit:

In Equity. No. 679.

THE CONTINENTAL OIL COMPANY, a Corporation, Plaintiff,

v.

O. O. ASKREN, as Attorney General of the State of New Mexico; CHARLES U. STRONG, as State Treasurer of the State of New Mexico; MANUEL MARTINEZ, as Secretary of State of the State of New Mexico, and ALEXANDER READ, as District Attorney of the First Judicial District of the State of New Mexico, Defendants.

Bill of Complaint.

To the Honorable Colin Neblett, Judge of the District Court of the United States in and for the District of New Mexico:

The Continental Oil Company, a corporation duly organized under and by virtue of the laws of the State of Colorado, and a citizen of said state having its principal office at Denver, Colorado, brings this its bill against O. O. Askren, as Attorney General of the State of New Mexico, Charles U. Strong, as Treasurer of the State of New Mexico, Manuel Martinez, as Secretary of State, of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, all citizens of the State of New Mexico, residing at Santa Fe, in said state.

And for its cause of action against the defendants states:

3 1. That the plaintiff, The Continental Oil Company, is a corporation duly organized and existing under and by virtue of the laws of the state of Colorado, and has its principal office at the city of Denver, in the state of Colorado, and is a citizen and resident of said state of Colorado; that it is now and at all times hereinafter named has been duly authorized to do business within the state of New Mexico; that the defendant O. O. Askren is the duly elected, qualified and acting Attorney General of the State of New Mexico, and is a resident and citizen of said State of New Mexico, and resides at Santa Fe in said state; that the defendant Charles U. Strong, is the duly elected, qualified and acting Treasurer of the State of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state; that the defendant Manuel Martinez is the duly elected, qualified and acting Secretary of State of the state of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state; that the defendant Alexander Read is the duly elected, qualified and acting District Attorney of the First Judicial District of the State of New Mexico, and is a resident and citizen of said state of New Mexico, and resides at Santa Fe in said state.

2. That the amount in controversy in this suit exceeds the sum of three thousand dollars (\$3,000) exclusive of interest and costs, and involves a question arising under the constitution and laws of the

United States with respect to the validity, when tested by the constitution of the United States, of that act of the legislature of the state of New Mexico entitled: "An Act Providing for an Excise Tax Upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein, Providing for the Inspection of Gasoline, and Making It Unlawful to Sell Gasoline below a Certain Grade without Notifying the Purchaser; Providing Penalties for Violation of this Act, and for Other Purposes," approved March 17th, 1919; that it is specially claimed in this

4 suit by the plaintiff that said act of the legislature of the state of New Mexico is unconstitutional and in violation of Section 8 of Article I of the Constitution of the United States which vests in the Congress the exclusive power to regulate commerce between the states, and that said act also is in violation of Section 10 of Article I of the Constitution of the United States which prohibits any state without the consent of the Congress, from laying any duties upon imports or exports except such as are absolutely necessary for the execution of its inspection laws, and this suit is between citizens of different states.

3. That the plaintiff is, and at all times herein named has been, engaged in business as a merchant and in buying and selling gasoline and other petroleum products; that in the usual and regular course of its business the plaintiff purchases gasoline in the states of Colorado, California, Oklahoma, Texas and Kansas, and from each and all of said states ships gasoline into the state of New Mexico, there to be sold and delivered to its customers in said state; that in the usual and ordinary method for the conduct of its business which has been adopted and had long been in use prior to the enactment of the statute aforesaid, and which is still in use, the plaintiff purchases in the state of Colorado, California, Oklahoma, Texas and Kansas, or in some one of said states, gasoline, and ships said gasoline in tank cars from the state in which purchased into the state of New Mexico, and there, according to its custom and the ordinary method in the conduct of its business, it sells in said tank car or tank cars the whole of the contents thereof to a single customer, and before the package or packages in which the gasoline was shipped have been broken; that in the usual and regular course of its business it purchases gasoline in one of the states aforesaid other

5 than the state of New Mexico, and ships the gasoline so purchased from that state in barrels and in packages containing not less than Two (2) 5-gallon cans into the state of New Mexico, and there, in the usual and ordinary course of its business, without breaking said barrels or packages containing said cans, it is accustomed to sell and was accustomed to sell prior to the enactment of the law aforesaid the gasoline in said original barrels and packages, and according to said custom the said gasoline is sold and delivered to the customers of the plaintiff in precisely the same form and condition as when received in the state of New Mexico; that the gasoline purchased, shipped and sold as aforesaid in said tank cars, barrels and packages containing cans of gasoline is not purchased from a licensed distributor of gasoline in the state of New Mexico,

and accordingly the plaintiff, in shipping, selling and disposing of gasoline in the manner aforesaid, is a distributor of gasoline as the term "distributor" is defined by the aforesaid act of the legislature of the state of New Mexico; that plaintiff has in the state of New Mexico thirty-seven (37) stations to which it ships gasoline from time to time in the regular course of its business in the manner hereinabove described, and from which it sells gasoline in the manner above stated; that said act of the legislature of the state of New Mexico requires the plaintiff to pay the sum of Fifty dollars (\$50.) per annum for each of its said stations as an annual license tax for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid, and said act declares it to be unlawful for any person to distribute or sell gasoline after July 1, 1919, without having paid said license tax; that said act requires the plaintiff to make application to the Secretary of State, who is authorized to issue said license, and to accompany said application with a remittance of the amount of the license; that said act further exacts of the plaintiff that it shall pay for the privilege of shipping and selling gasoline in interstate commerce in the manner aforesaid what the act terms an exise tax of two cents (2¢) for each and every gallon of gasoline so as aforesaid shipped and sold; that for the privilege of engaging in interstate commerce in the manner aforesaid said act further requires that the plaintiff shall render to the State Auditor a monthly statement in such form as said Auditor shall prescribe of all gasoline received and sold by the plaintiff during the preceding month, accompanied by a remittance of the amount of money equal in the aggregate to two cents for each gallon shipped and sold in interstate commerce in the manner aforesaid; that it is provided by said act that any person who shall engage or continue in the business of selling gasoline in the state of New Mexico without paying said taxes for the privilege of doing so shall be deemed guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than One Hundred Dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail for not more than ninety (90) days, or by both such fine and imprisonment, and it is further provided by said act that any person failing to pay said license tax shall be enjoined in an action brought in the name of the state from further distributing or selling gasoline in the state of New Mexico; that it is further provided that to said tax shall be added as a penalty five per cent (5%) of the amount thereof, and a monthly interest of one per cent (1%) until it shall be paid, and that it shall be the duty of the State Treasurer to cause suit to be brought in the name of the state to collect such tax, penalty and interest, and it is declared to be the duty of the Attorney General of the State of New Mexico and the District Attorney to commence and prosecute such suit or suits at the request of the Treasurer; that said taxes constitute an unlawful burden upon interstate commerce, and the act of the legislature aforesaid imposing such taxes for the privilege of engaging in interstate commerce as aforesaid is in conflict with those provisions of the Constitution of the United States here-

inabove mentioned and is absolutely void; that said act of the legislature of the state of New Mexico provides for the appointment of inspectors, one for each of the eight judicial districts of the state, but said inspectors are not required by said act to inspect any gasoline sold or used in said state, and no inspection of gasoline sold in the state of New Mexico is required to be made; that all gasoline sold, used or distributed in the State of New Mexico is imported into the state in interstate commerce, and no gasoline is produced in the state of New Mexico; that in addition to the sales of gasoline as aforesaid the plaintiff ships gasoline as aforesaid from some or all of the states aforesaid in tanks, barrels, or packages, and sells said gasoline so shipped from said tanks, barrels and package in such quantities as the purchaser desires.

That upon and after the first day of July, 1919, unless prevented by writ of injunction of this Honorable Court, the defendants will seek to enforce the said unconstitutional act of the legislature of New Mexico, and unless the plaintiff submits to the unlawful exactions and pays the said unlawful charges for the privilege of continuing in business defendants will enjoin the plaintiff from the conduct of its business and will cause the officers and agents of the plaintiff at each and all of its various stations aforesaid to be arrested, prosecuted and fined and if it continues to carry on and conduct its business in interstate commerce as aforesaid without paying to the state of New Mexico the sums of money exacted by said act for the privilege of doing so suits will be started from time to time for the collection of said unlawful exactions for the privilege of engaging in interstate commerce, and the plaintiff's business destroyed or

8 materially injured, and the plaintiff will be subjected to the burdens of a multiplicity of suits to enforce the collection of said unlawful exactions, and its officers and agents will be hampered and restrained by arrests and prosecutions unless it submits to said unlawful exactions; that the plaintiff has no plain, adequate or complete remedy at law by reason of the matters and things hereinabove set forth, and unless this court of equity takes jurisdiction hereof and grants plaintiff the injunction as herein prayed, the plaintiff will suffer great and irreparable injury as hereinbefore set forth; that immediate and irreparable injury and damage will result to the plaintiff before this cause can be heard on notice duly and regularly given, unless a temporary restraining order is granted.

Wherefore, forasmuch as the plaintiff is without any adequate remedy at law, and to the end that the plaintiff may obtain relief in this court of equity, where such matters are properly cognizable, plaintiff prays:

That your Honor grant unto the plaintiff a writ of subpoena directed to the said defendants and each of them requiring each of them to answer this bill of complaint, but not under oath, an answer under oath being hereby expressly waived as to each of the defendants; that a temporary restraining order be issued against defendants and each of them and all persons acting through or under them or either of them, or under the direction of either or any of them enjoining them and each of them from taking any action

looking to the enforcement of the aforesaid act of the legislature of the state of New Mexico, and that said act be declared by this court to be unconstitutional and void, and that this Honorable Court, upon the issuing of said temporary restraining order appoint a day when the parties may be heard upon plaintiff's application for a preliminary injunction, and that upon said day the court grant unto this plaintiff its preliminary injunction to the same effect as aforesaid, and that upon final hearing said injunction be made perpetual; and that the plaintiff have such other and further relief, both general and special, as it may appear in equity to be entitled to, and that ~~it~~ have judgment for costs of suit.

E. R. WRIGHT,
S. B. DAVIS, JR.,
MILTON SMITH,
CHAS. R. BROCK,
O. H. FERGUSON,
Solicitors for Plaintiff.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

E. R. Wright, being first duly sworn on oath deposes and says: That he is one of the solicitors for the plaintiff in the above entitled suit, that he has read the foregoing bill of complaint and knows the contents thereof, and that the allegations therein made are true to the best of his knowledge, information and belief, and that he makes this verification on behalf of the plaintiff because it is a corporation.

E. R. WRIGHT.

Subscribed and sworn to before me this 26 day of June, A. D. 1919.

My commission expires Oct. 2, 1920.

[SEAL.]

ROBERT L. ORMSBEE,
Notary Public.

10

(Motion to Dismiss Bill.)

Filed July 1, 1919.

Come now the defendants herein and move the Court to dismiss the bill herein filed, and for their reasons for said motion say:

That the said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

Wherefore, defendants pray that the bill herein be dismissed with their costs.

O. O. ASKREN,
A. B. RENEHAN,
HARRY S. BOWMAN,
N. D. MEYER,
Solicitors for Defendants.

I, Harry S. Bowman, solicitor for the defendants in the above entitled matter, do hereby certify that the foregoing motion in my opinion is well founded in law.

HARRY S. BOWMAN,
Solicitor for Defendants.

O. O. Askren, being first duly sworn, upon his oath, says that he is one of the defendants in the above entitled action, and that the foregoing motion is not interposed for the purposes of delay.

O. O. ASKREN.

Subscribed and sworn to before me this 1st day of July, A. D. 1919.

[Seal Dist. of N. M. U. S. Court.]

WYLY PARSONS,
Clerk U. S. Dist. Court.

11 (Order Overruling Motion to Dismiss.)

Filed and Entered July 3, 1919.

This cause came on to be heard at this term upon the motion of the defendants to dismiss and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that said motion be, and the same hereby is overruled, to which the defendants and each of them except, and it is further ordered that the defendants be given ten (10) days to answer the bill of complaint herein.

Done in open court this 3rd day of July, 1919.

By the Court:

COLIN NEBLETT,
United States District Judge.

(Order Granting Temporary Injunction.)

Filed and Entered July 5, 1919.

This cause came on to be further heard at this term upon the application of the plaintiff for a temporary restraining order, and it appearing that due notice of the application was given to the defendants and each of them and said application was argued by counsel, both for the plaintiff and the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the defendants and each of them be restrained from taking any action looking to the enforcement as against the plaintiff in this cause, of that Act of the Legislature of the State of New Mexico approved March 17, 1919 and entitled:

"An Act Providing for an Excise Tax upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Re-

12 tail Dealers Therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline Below a Certain Grade Without Notifying Purchaser Thereof; Providing Penalties for Violations of This Act and for Other Purposes."

which said restraining order shall become effective upon the execution of bond by the plaintiff running to the State of New Mexico in the penal sum of Ten Thousand Dollars, conditioned as required by law and filed in this suit with sureties to be approved by the Clerk of this Court.

It is further ordered that the 21st day of July, 1919, be and is hereby designated as the time when the plaintiff may be heard upon its application for a preliminary injunction.

Done in open Court this 5th day of July, A. D. 1919.

By the Court:

COLIN NEBLETT,
United States District Judge.

(Bond on Temporary Restraining Order.)

Filed July 5, 1919.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Know all men by these presents, That we, The Continental Oil Company a corporation, under the laws of the State of Colorado, as principal and the United States Fidelity and Guaranty Company, a corporation under the laws of the State of Maryland, as its surety, are held and firmly bound unto the State of New Mexico, in the penal sum of Ten Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and our respective successors and assigns, firmly by these presents.

13 Sealed with our seals and dated this 5th day of July, 1919.

The condition of the above bond and obligation is such that whereas, the above bounden, The Continental Oil Company, a corporation has filed its bill of complaint in the United States District Court for the District of New Mexico against the above named O. O. Askren, as Attorney General of the State of New Mexico, Charles U. Strong, as State Treasurer of the State of New Mexico, Manuel U. Martinez, as Secretary of State of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, praying, among other things, for a temporary restraining order to restrain the said defendants and each of them from taking any action looking to the enforcement as against the said The Continental Oil Company, a corporation, of that act of the Legislature of the State of New Mexico approved March 17, 1919 and entitled:

"An Act Providing for an Excise Tax upon the Sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasoline and making it unlawful to Sell Gasoline Below a Certain Grade without notifying Purchaser thereof; Providing Penalties for violations of This Act and for Other Purposes."

And, whereas, said court has granted said temporary restraining order for that purpose, according to the prayer of said bill to become effective upon the execution of a bond by the said The Continental Oil Company running to the State of New Mexico in the said sum of Ten Thousand Dollars;

Now therefore, if the above bounden The Continental Oil Company, a corporation, its successors and assigns, shall well and truly pay or cause to be paid to the said State of New Mexico, and
 14 to any official thereof as may be required by the terms of said Act above referred to, any and all fees and taxes, and also any and all costs and damages that may be awarded against the said, The Continental Oil Company, in case said temporary restraining order shall be dissolved, then this obligation to be void; otherwise to be and remain in full force and effect.

THE CONTINENTAL OIL COMPANY,

By E. R. WRIGHT,

Its Attorney.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[SEAL U. S. F. & G. CO.]

By C. A. BISHOP,

Its Att'y-in-fact.

STATE OF NEW MEXICO,
 County of Santa Fe, ss:

On this 5th day of July 1919 before me personally appeared E. R. Wright, to me known to be the person who executed the foregoing instrument as the attorney for The Continental Oil Company, on behalf of the said The Continental Oil Company, a corporation, and acknowledged that he executed the same as the free act and deed of the said The Continental Oil Company.

In witness whereof, I have hereunto set my hand and notarial seal the day and year last in this certificate above written

IDA C. KRICK,

[NOTARIAL SEAL.] Notary Public, Santa Fe County, N. M.

My Commission Expires Jan. 9, 1922.

Approved this 5th day of July, 1919.

COLIN NEBLETT,
 U. S. Dist. Judge.

15. STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 5th day of July 1919, before me personally came C. A. Bishop, known to me to be the attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation described in and which executed the within and foregoing bond of The Continental Oil Co., as a surety thereon, and who being by me duly sworn, deposes and says, that he resides in the City of Santa Fe, State of New Mexico; that he is the attorney-in-fact of said Company and knows the corporate seal thereof; that the said United States Fidelity and Guaranty Company is duly and legally incorporated under the laws of the State of Maryland; that the seal affixed to the within bond is the corporate seal of said Company and was thereby affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that the signatures of said C. A. Bishop subscribed to said bond is the genuine handwriting of C. A. Bishop and was thereto subscribed by order and authority of said Board of Directors; and that the assets of said Company, unencumbered and liable to execution exceed its claims, debts and liabilities of every nature by more than the sum of One Million Dollars; that the United States Fidelity and Guaranty Company has complied with all the laws of the State of New Mexico relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed.

C. A. BISHOP,
Deponent's Signature.

Sworn to and acknowledged to before me, and subscribed in my presence this 5th day of July, 1919.

[NOTARIAL SEAL.]

IDA C. KRICK,
Notary Public.

My commission expires January 9th, 1922.

16. (*Stipulation Waiving Presence of Hon. Colin Neblett, U. S. District Judge, District of New Mexico, as One of Three Judges to Hear Application for a Preliminary Injunction.*)

Filed July 11, 1919.

It is hereby stipulated and agreed by and between the parties hereto that the presence of the Hon. Colin Neblett, United States District Judge in and for the District of New Mexico as one of the three judges to hear the plaintiffs' application for a preliminary injunction in the above entitled — under the provisions of Section 266 of the Judicial Code is hereby waived, and

It is further stipulated and agreed by and between the parties hereto, that the Senior Judge of the Eighth Circuit Court of Ap-

peals may call in any other district or circuit judge to sit in the place and stead of the said Colin Neblett, District Judge, upon the hearing of Plaintiffs' said application for a preliminary injunction in the above entitled causes.

Dated at Santa Fe, New Mexico, this 11th day of July, 1919.

CHARLES R. BROCK,

S. B. DAVIS, JR.,

E. R. WRIGHT,

Attorneys and Solicitors for the Plaintiffs.

O. O. ASKREN,

Attorney General of the State of New Mexico, on Behalf of Defendants,

By HARRY S. BOWMAN,

Assistant Attorney General.

17 (Stipulation Setting Cause for Hearing at St. Paul, Minn., for July 15, 1919.)

Filed July 10, 1919.

It is hereby stipulated and agreed by and between the parties hereto, that the plaintiffs' applications for a temporary injunction in the above entitled causes, heretofore set for hearing at Santa Fe, New Mexico on the 21st day of July 1919, may be heard at Saint Paul, Minn., on the 15th day of July, 1919, at the hour of ten o'clock in the forenoon of said day, and that said hearing be had at the Court Room of the Circuit Court of Appeals for the Eighth Circuit, or at such other place in the said City of Saint Paul as may be convenient to the court.

Dated at Santa Fe, New Mexico, this 9th day of July, 1919.

CHARLES R. BROCK,

S. B. DAVIS, JR.,

E. R. WRIGHT,

Attorneys and Solicitors for Plaintiffs.

O. O. ASKREN,

Attorney General, State of New Mexico,

By HARRY S. BOWMAN,

Assistant Attorney General.

Due and timely notice of plaintiff's application for a temporary injunction to be made at Saint Paul, Minn., on the 15th day of July, 1919, under the provisions of Section 266 of the Judicial Code, is hereby admitted this 9th day of July, 1919.

O. A. LARRAZOLA,

Governor of New Mexico,

By HARRY S. BOWMAN,

Assistant Attorney General.

O. O. ASKREN,

Attorney General of New Mexico,

By HARRY S. BOWMAN,

Assistant Attorney General, in Person and as Attorney for the Named Defendants.

17½

(Order of Reference to Three Judges.)

Filed Aug. 23, 1919, nunc pro tunc as of July 9, 1919.

Application having been heretofore made herein for a hearing before three judges, under the provisions of Section 266 of the Judicial Code, upon the application of the plaintiff herein for an interlocutory injunction, restraining the enforcement of a certain statute of the State of New Mexico on the ground that the same was in contravention of the constitution of the United States;

And the parties hereto having stipulated that said application for an interlocutory injunction herein may be heard before the Senior Judge of the Circuit Court of Appeals for the Eighth Circuit, and such other judges as said Senior Judge may call to his assistance, at St. Paul, Minn.;

Now, therefore, it is

Ordered, that this cause be and the same hereby is referred to the Hon. Walter H. Sanborn, Presiding Judge of the Circuit Court of Appeals for the Eighth Circuit, and to such other two judges as said presiding judge may call to his assistance, for the purpose of hearing and determining said application of the plaintiff for an interlocutory injunction herein.

COLIN NEBLETT,
District Judge.

18

(Order Granting Preliminary Injunction.)

Issued July 15, 1919, and Filed in Office of Clerk U. S. District Court, District of New Mexico, July 15, 1919.

This cause came on to be further heard at this term upon the application of the plaintiffs for a temporary injunction in pursuance of Section 266, of the Judicial Code, and it appearing that due notice of the application was given to the defendants and each of them and said application was argued by counsel, both for the plaintiff and the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the defendants and each of them be restrained until the final decree in this Court, or the further order of this Court from taking any action looking to the enforcement as against the plaintiff in this cause, of that Act of the Legislature of the State of New Mexico approved March 17, 1919 and entitled:

"An Act *Provided for the* excise Tax upon the Sale or Use of Gasoline and for a license Tax to be paid by distributors and retail dealers therein; providing for collection and application of such taxes; providing for the inspection of gasoline and making it unlawful to sell gasoline below a certain grade without notifying purchaser thereof; providing penalties for violations of this Act and for other purposes."

which said injunction order shall become effective upon the execution of bond by the plaintiff running to the State of New Mexico in the penal sum of \$25,000.00 *dollars* conditioned as required by law and filed in this suit with sureties to be approved by the Clerk of the District Court for the District of New Mexico.

Done at St. Paul, Minnesota, this 15th day of July, A. D. 1919.

WALTER H. SANBORN,
Senior Circuit Judge.

JOHN H. COTTERAL,
District Judge.

WILBUR F. BOOTH,
District Judge.

10

(Petition for Appeal.)

Filed July 17, 1919.

Whereas, heretofore a restraining order was granted in said cause on the application of the plaintiff; and

Whereas, thereafter the application of the plaintiff for a temporary injunction, under stipulation, was referred to the special tribunal constituted as shown in the caption hereof; and

Whereas, after due notice, the said application for a temporary injunction against the defendants came on to be heard the 15th day of July, 1919, before said special tribunals, and on said day the writ prayed for was granted, by the decree thereof, whereby the defendants jointly and severally are agreed;

Now come the defendants, by A. B. Renehan, Esq., Special Attorney General of the State of New Mexico, one of their solicitors and pray an appeal from the judgment and decree aforesaid to the Supreme Court of the United States, and herewith submit their assignment- of error and prayer for reversal of said judgment and decree, and for dissolution of the writ of injunction granted, and for such other relief as may be proper.

A. B. RENEHAN,
*Special Assistant Attorney General of the State
of New Mexico, Solicitor for Defendants.*

(Assignments of Error.)

Filed July 17, 1919.

Now come the defendants and as part of the foregoing petition for appeal *and* assign as errors committed by the said Special Tribunal in granting the temporary writ of injunction in said cause granted, and thereon pray that the judgment and decree of the said special tribunal may be reversed, and the cause remanded with instructions to dissolve the said writ and to dismiss the bill, to-wit:

20 1. That it appears by the bill of complaint that the annual tax of \$50. per year required to be collected from the plaintiff, by the Act of the Legislature of the State of New Mexico of

which complaint is made, is an internal or occupation tax assessed against all persons in the same category or classification as the plaintiff, and that it is not a burden on Interstate Commerce, within the meaning of the Federal Constitution, and the said Special Tribunal erred in holding to the contrary.

2. That the tax of 2¢ per gallon on gasoline is proposed to be levied on sales of gasoline as made, after the commodity has come to rest and reached its destination in New Mexico, and become commingled with the common property of the State of New Mexico, and not while it is in transit, or while it is in interstate commerce, and the said court erred in holding to the contrary.

3. That neither the said annual tax of \$50. per year or the gallon excise or charge of 2¢ is a tax or charge for the privilege of doing interstate business, but is and will be presumed to be directed only to intrastate commerce, and the said court erred in holding to the contrary.

4. That the taxes mentioned are of a three-fold character: first, for inspection, pro tanto, — the cost thereof as fixed and limited by the act itself, within bounds which on their face are reasonable; second, for occupation in a peculiarly hazardous form of enterprise or business; and, third, for excise or charge upon sale, use or consumption of gasoline, and are lawful and within the permission of the Federal Constitution, and not in any of said respects an imposition upon interstate commerce, in the constitutional sense, but being under the reserve police power of the state in regard to the inspection feature of the law, which is but one of several purposes, and otherwise are matter of domestic and not federal concern, and the said court erred in holding to the contrary.

5. That the court erred in holding that the said taxes are not at least in legitimate part for inspection, and that they constitute a charge for the privilege of doing an interstate business or engaging in interstate commerce.

6. That upon the face of the bill the plaintiff in its business is a localized merchant and subject to the taxes sought to be gathered under the said Act of the New Mexico Legislature.

O. O. ASKREN,

Attorney General of New Mexico;

HARRY S. BOWMAN,

Assistant Attorney General of New Mexico;

A. B. RENEHAN,

Special Assistant Attorney General,

Solicitors for Defendant.

(Order Granting Appeal.)

Filed and Entered July 17, 1919.

This cause having come on to be heard this 17th day of July, 1919, upon the petition of the defendant for an appeal to the Su-

preme Court of the United States from the interlocutory decree of the special tribunal to which it was submitted, granting a temporary writ of injunction against the defendants and each of them, to restrain them from enforcing or attempting to enforce that particular statute of the State of New Mexico, which is the subject matter of the bill of complaint herein, the defendants appearing by A. B. Renehan, Special Assistant Attorney General of the State of New Mexico, one of their solicitors, and the plaintiff appearing by E. R. Wright, Esq., one of its solicitors, and the Court having seen and considered the assignments of error exhibited with the petition for appeal;

22 It is ordered that an appeal be and the same hereby is granted to the Supreme Court of the United States from the judgment and decree aforesaid.

It is further ordered that the defendants make bond for costs according to the statute and the rule in the penalty of \$500.00.

It is further ordered that the Clerk of the United States District Court, without delay, make and transmit to the Clerk of the Supreme Court of the United States a full and true transcript of the proceedings in the said cause, including the complaint, the motion to dismiss, the restraining order, the bond therefor, the order of reference, under Section 266 of the Judicial Code, to three judges, the order granting a temporary injunction, the temporary injunction bond, the petition for appeal, with assignments of error, the order granting the appeal and the cost bond.

WALTER H. SANBORN,

One of the Judges of the United States Circuit Court of Appeals of the Eighth Circuit, Presiding Judge Thereof, and One of the Judges of the Special Tribunal in the Cause Aforesaid.

(Cost Bond.)

Filed July 17, 1919.

Know all men by these presents: That we, O. O. Askren, Attorney General of the State of New Mexico, Charles U. Strong, Treasurer of the State of New Mexico, Manuel Martinez, Secretary of State of the State of New Mexico, and Alexander Read, District Attorney of the First District Attorney's District of the State of New Mexico, as principals, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, a corporation duly authorized to make bonds in the courts of the United States, as surety, are held and firmly bound unto The Continental Oil Company, its successors and assigns in the full and just sum of Five Hundred (\$500.) Dollars, to be paid to the said The Continental Oil Co., its successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, and successors, jointly and severally by these presents.

23 Sealed with our seals and dated this 17th day of July, 1919.

Whereas, lately, on the 15th day of July, 1919, a special tribunal, under Section 266, of the United States Judicial Code, composed of Honorable Walter H. Sanborn, one of the Justices of the United States Circuit of Appeals of the Eighth Circuit, Honorable John H. Cotteral, and Honorable Wilbur F. Booth, United States District Judges, in a matter pending before it for a temporary injunction on the application of the said The Continental Oil Company as plaintiff, and the principals herein as defendants, judgment was rendered and order made for an interlocutory writ of injunction against the said principals, and the said principals have obtained the allowance of an appeal to the Supreme Court of the United States to reverse the said judgment and order in the aforesaid suit which is depending in the District Court of the United States for the District of New Mexico, and a citation directed to the said The Continental Oil Co., citing and admonishing it to be and appear before the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days from and after the date of the said citation:

Now, the condition of the above obligation is such that if the said principals shall prosecute said appeal to effect, and pay all costs, if they fail to make good said plea, then the said obligation to be void; else to remain in full force and virtue.

O. O. ASKREN,
Attorney General of the State of New Mexico,
By A. B. RENEHAN,

His Attorney.
CHARLES U. STRONG,
Treasurer of the State of New Mexico,
By A. B. RENEHAN,

His Attorney.
MANUEL MARTINEZ,
Secretary of State, etc.,
By A. B. RENEHAN,

His Attorney.
ALEXANDER READ,
District Attorney, etc.,
By A. B. RENEHAN,

His Attorney.
UNITED STATES FIDELITY &
GUARANTY COMPANY.

[SEAL U. S. F. & G. CO.]

W. A. LANG,
Attorney-in-fact.

GEO. W. ELLIOT.
EDITH M. COOKE.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17th day of July, 1919, before me personally appeared A. B. Renehan, to me well known to be the same person described in

and who executed the foregoing bond in behalf of and for the principals therein named and acknowledged to me that he executed the same as the free act and deed of the several principals, to-wit: O. O. Askren, etc., Charles U. Strong, etc., Manuel Martinez, etc., and Alexander Read, etc.

In witness whereof I have hereunto set my hand and notarial seal the day and year in this certificate written.

[NOTARIAL SEAL.]

JEANETTE N. DAILEY,
Notary Public, Ramsey County, Minnesota.

My Commission expires March 6, 1920.

STATE OF MINNESOTA,

County of Ramsey, ss:

On this 17 day of July 1919, before me a Notary Public within and for said County and State, personally appeared W. A. Lang to me personally known, who being by me duly sworn upon oath did say that he is the Agent and Attorney-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said W. A. Lang did acknowledge that he executed the said instrument as the free act and deed of said Company.

[NOTARIAL SEAL.]

EDITH M. COOKE,
Notary Public, Ramsey Co., Minn.

My commission expires June 2, 1920.

The foregoing bond and the security furnished thereby are hereby approved and the petition for the appeal herein is hereby granted.
July 17, 1919.

WALTER H. SANBORN,
Senior Circuit Judge.

(Bond on Preliminary Injunction.)

Filed July 22, 1919.

STATE OF NEW MEXICO,

County of Santa Fe, ss:

Know all men by these presents, That we, The Continental Oil Company, a corporation under the laws of the State of Colorado, as principal, and the United States Fidelity and Guaranty Company, a corporation under the laws of the State of Maryland, as its surety, are held and firmly bound unto the State of New Mexico,

in the penal sum of Twenty Five Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our respective successors and assigns, firmly by these presents.

26 Sealed with our seals and dated this 22nd day of July, 1919.

The condition of the above bond and obligation is such that, whereas, the above bounden, The Continental Oil Company, a corporation, has filed its bill of complaint in the United States District Court for the District of New Mexico, against the above named O. O. Askren, as Attorney General of the State of New Mexico, Charles U. Strong, as State Treasurer of the State of New Mexico, Manuel Martinez, as Secretary of State of the State of New Mexico, and Alexander Read, as District Attorney of the First Judicial District of the State of New Mexico, praying, among other things, for a preliminary injunction restraining and enjoining the said defendants and each of them from taking any action looking to the enforcement as against the said The Continental Oil Company, a corporation, of that Act of the Legislature of the State of New Mexico approved March 17, 1919, and entitled:

"An Act providing for an Excise Tax upon the sale or Use of Gasoline and for a License Tax to be Paid by Distributors and Retail Dealers Therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasoline and Making it Unlawful to Sell Gasoline Below a Certain Grade without notifying Purchaser thereof; Providing Penalties for Violations of This Act and For Other Purposes;"

And, whereas, said court, heretofore, and on the 3rd day of July, 1919, granted a temporary restraining order in accordance with the prayer of said Bill of Complaint; and, whereas, upon the application of plaintiff and upon due notice under the provisions of Section 286 of the Judicial Code of the United States, a special tribunal, duly constituted under the provisions of said Section 286, and
27 consisting of the Honorable Walter H. Sanborn, senior circuit judge of the Eighth Circuit, Honorable John H. Cotteral and Honorable Wilbur K. Booth, District Judges, sitting at St. Paul, Minnesota, upon the 15th day of July, 1919, has granted said preliminary injunction, restraining and enjoining said defendants in accordance with the prayer of said Bill of Complaint, to become effective upon the execution of a bond by the said The Continental Oil Company, running to the State of New Mexico, in the said sum of Twenty Five Thousand Dollars;

Now, therefore, if the above bounden, The Continental Oil Company, a corporation, its successors and assigns, shall well and truly pay or cause to be paid to the said State of New Mexico, and to any official thereof as may be required by the terms of said Act above referred to, any and all fees and taxes, and also any and all costs and damages that may be awarded against the said The Continental Oil Company, in case said preliminary injunction shall be dissolved,

then this obligation to be null and void; otherwise to be and remain in full force and effect.

THE CONTINENTAL OIL COM-
PANY,
By E. R. WRIGHT,
Its Attorney.
UNITED STATES FIDELITY AND
GUARANTY COMPANY,

[SEAL U. S. F. & G. CO.]

By C. A. BISHOP,
Its Att'y-in-fact.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 22 day of July, 1919, before me personally appeared E. R. Wright, to me known to be the person who executed the foregoing instrument as the attorney for The Continental Oil Company, on behalf of the said The Continental Oil Company, a corporation, and acknowledged that he executed the same as the free act and deed of the said The Continental Oil Company.

28 In witness whereof I have hereunto set my hand and Notarial Seal, the day and year last above in this certificate written.

[NOTARIAL SEAL.] JOHN J. KENNEY,
Notary Public, Santa Fe County, N. M.

My commission expires June 8, 1920.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 22nd day of July, 1919, before me personally came C. A. Bishop, known to me to be the attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation described in and which executed the within and foregoing bond of Continental Oil Company as a surety thereon, and who being by me duly sworn, deposes and says, that he resides in the City of Santa Fe, State of New Mexico; that he is the attorney-in-fact of said Company and knows the corporate seal thereof; that the said United States Fidelity and Guaranty Company is duly and legally incorporated under the laws of the State of Maryland; that the seal affixed to the within bond is the corporate seal of said Company and was thereby affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that the signatures of said C. A. Bishop subscribed to said bond is the genuine handwriting of C. A. Bishop and was thereto subscribed by order and authority of said Board of Directors; and that the assets of said Company, un-

encumbered and liable to execution exceed its claims, debts and liabilities of every nature by more than the sum of One Million Dollars; that the United States Fidelity and Guaranty Company has complied with all the laws of the State of New Mexico relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed.

C. A. BISHOP,
Deponent's Signature.

Sworn to and acknowledged to before me, and subscribed in my presence this 22nd day of July, 1919.
[NOTARIAL SEAL.]

IDA C. KRICK,
Notary Public.

My commission expires Jan. 9th, 1922.

The above and foregoing bond is hereby approved as to form, sufficiency and execution this July 22, 1919.

WYLY PARSONS,
Clerk.

30

(*Præcipe for Transcript.*)

Filed Aug. 13, 1919.

To the Clerk of said Court:

Please prepare a transcript of record of the said cause on appeal to the Supreme Court of the United States, containing the following items:

1. The Complaint.
2. The motion to dismiss.
3. The order on motion to dismiss.
4. The restraining order.
5. The bond for restraining order.
6. The order of reference to three judges.
7. The stipulations for hearing before three judges at St. Paul, Minn.
8. The notice of hearing to the Attorney General and Governor of the State of New Mexico.
9. The order granting a temporary injunction.
10. The temporary injunction bond.
11. The petition for appeal.
12. The assignments of error.

13. The order granting the appeal.
14. The cost bond.
15. The citation on appeal with acknowledgment of service thereof.
16. This præcipe.
17. The Clerk's certificate and certificate of costs.

O. O. ASKREN,
Attorney General of the State of New Mexico;
 A. B. RENEHAN,
Attorneys for Defendants.

It is hereby stipulated and agreed, by and between counsel for the parties to the above entitled cause, that the above and foregoing præcipe calls for the preparation of a transcript of record in said cause, containing all matters necessary or proper for the consideration of said cause on appeal to the Supreme Court of the United States.

THE CONTINENTAL OIL COMPANY,
Plaintiff,

By E. R. WRIGHT,
One of Its Attorneys.

O. O. ASKREN,
Attorney General, etc.;

A. B. RENEHAN,
Attorneys for Defendants.

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Clerk's Certificate.

UNITED STATES OF AMERICA,
District of New Mexico, ss:

I, Wyly Parsons, Clerk of the District Court of the United States for the District of New Mexico, do hereby certify that the foregoing transcript, consisting of 31 pages, constitutes a full, true and correct copy of the proceedings had and orders entered in said cause, as set forth therein; as the same appear on file and of record in this office, with the exception of the citation on appeal, the original of which is attached at page 1 of the foregoing transcript.

The foregoing constitutes the entire transcript in the cause, as indicated by the præcipe for transcript on page 30 thereof, and as stipulated by the parties in said præcipe.

Witness my hand and the official seal of said Court, at Santa Fe, in the District of New Mexico, this 23rd day of August, 1919.

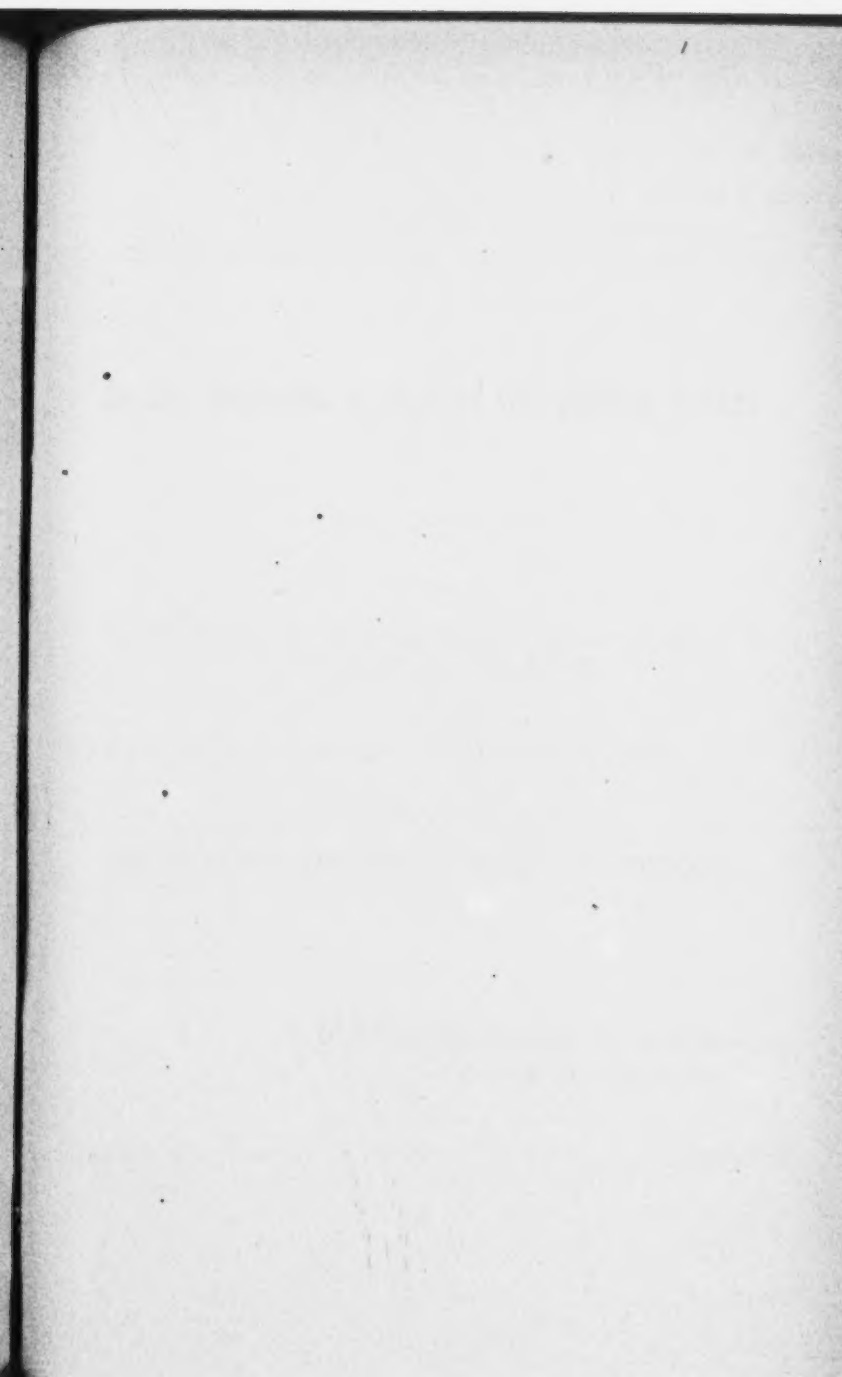
[Seal United States District Court, District of New Mexico, 1912.]

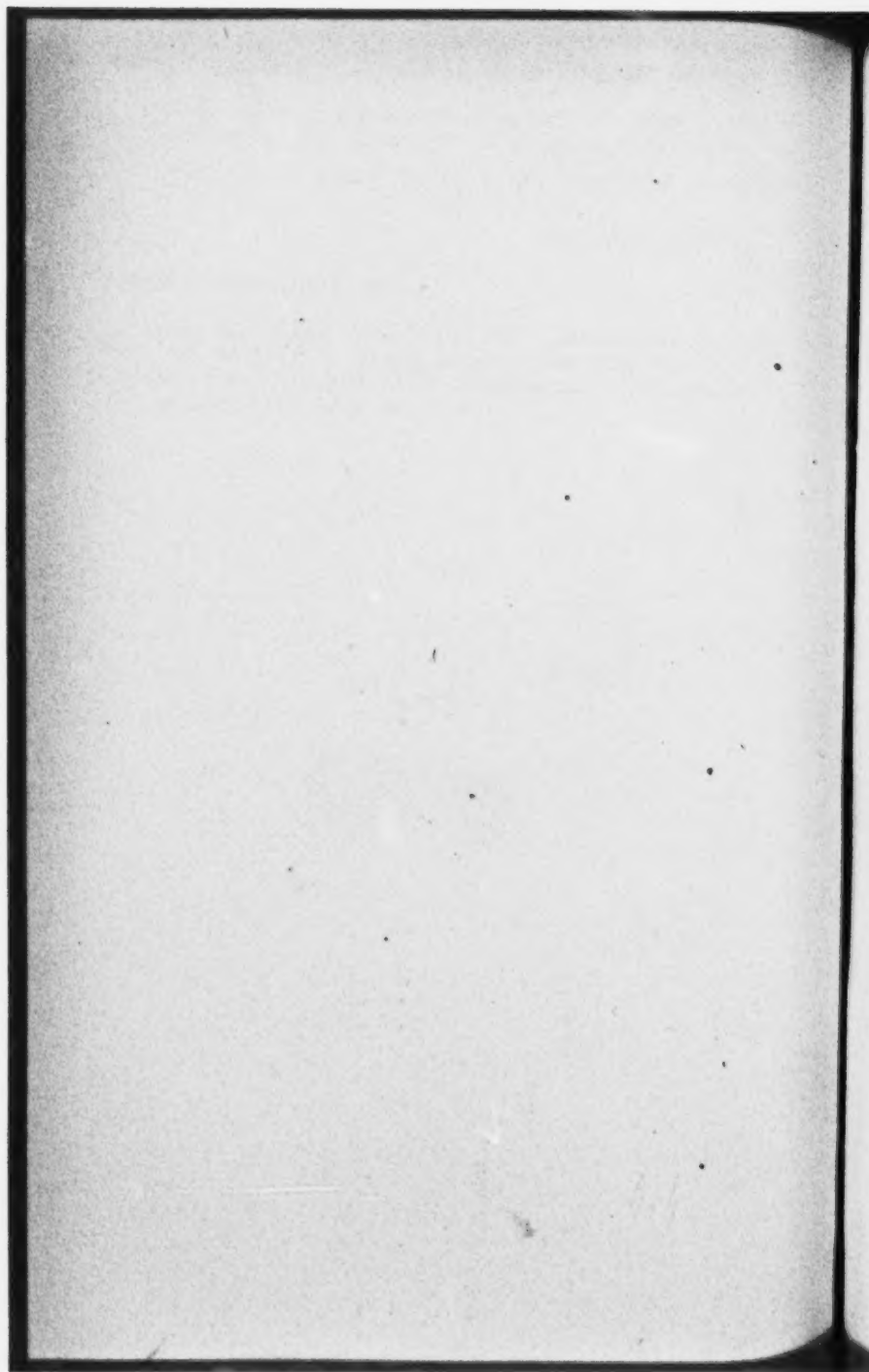
WYLY PARSONS,
Clerk.

Cost of Transcript, \$13.10.

Endorsed on cover: File No. 27,276. New Mexico D. C. U. S. Term No. 521. O. O. Askren, Attorney General of the State of New Mexico, et al., appellants, vs. The Continental Oil Company. Filed August 29th, 1919. File No. 27,276.

(521)





Office Supreme Court, U. S.
FILED

OCT 8 1919

JAMES D. MAHER,
CLERK.

No. 521.

In the Supreme Court of the United States

October Term, 1919

O. O. ASKREN, *as Attorney General of the State of New Mexico, et al., Appellants,*
vs.

THE CONTINENTAL OIL COMPANY, *Appellee.*

MOTION TO ADVANCE CAUSE ON DOCKET

A. B. RENEHAN, Santa Fe, New Mexico,
Attorney for Appellants.

IN THE
SUPREME COURT OF THE UNITED STATES

O. O. ASKREN, *as Attorney General of the State of New Mexico*; CHARLES U. STRONG, *as State Treasurer of the State of New Mexico*; MANUEL MARTINEZ, *as Secretary of State of the State of New Mexico*; and ALEXANDER READ, *as District Attorney of the First Judicial District of the State of New Mexico*, Appellants,

vs.

THE CONTINENTAL OIL COMPANY, *a corporation*,
Appellee.

MOTION TO ADVANCE CAUSE ON DOCKET.

Come now the appellants in the above entitled cause, by their attorney, and show to the court that this is an appeal from an order granting a temporary injunction, enjoining certain officers of the State of New Mexico from enforcing a certain law of said State, on the ground that said law is in contravention of the provisions of the Constitution of the United States. That the income which the State of New Mexico is enjoined from collecting, by reason of said injunction and of similar injunctions in two kindred cases, in regard to which cases motions to advance on the docket of this court are filed herewith, is uncertain in amount and can not be accurately computed, but that as nearly as can be estimated at this time it will amount to the sum of one hundred and forty thousand dollars a year, the amount of money which said State of New Mexico is enjoined from collecting in each of said cases being estimated as follows, to-wit: in the case of O. O. Askren, et al., appellants, vs. The Texas Company, appellee, fifty thousand dollars; in the case of O. O. Askren, et al., appellants, vs. The Continental Oil Company, appellee, eighty thousand dollars

and in the case of O. O. Askren, et al., appellants, vs. The Sinclair Refining Company, appellee, ten thousand dollars. That pending the final determination of the validity or invalidity of said statute by this court, the administration of said law in regard to other persons is greatly embarrassed, in that there is insufficient revenue appropriated, aside from that which the State of New Mexico is enjoined from collecting, as aforesaid, to defray the salaries of the gasoline inspectors and tax collectors appointed under the terms of the said act, and the State of New Mexico is, for that reason, prevented by said injunction from employing officers to enforce compliance with the provisions thereof.

That the State of New Mexico is also greatly embarrassed, pending the determination of this cause, in carrying out the provisions of its plan to improve the public highways in said State, for the reason that the net income to be derived from the enforcement of said law has been appropriated to defray the expenses of such highway improvement, and that the treasury of said State has become so depleted in funds, by reason of the adoption of prohibition in said State in October, 1918, and the resulting loss of income from liquor dealers therein, that there are insufficient available funds to carry out said highway improvement program in the absence of those derived from the enforcement of said law.

WHEREFORE the appellants pray that this cause may be advanced on the docket of and heard by this Honorable Court at the earliest possible date, in accordance with the provisions of section 949 of the United States Revised Statutes.

A. B. RENEHAN,
Attorney for Appellants,
Santa Fe, New Mexico.

Service of the within motion acknowledged this 1st day of October, 1919.

E. R. WRIGHT,
Attorney for Appellee.